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COURT OF CRIMINAL APPEALS
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PD-0395-20

FILED
COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

NICOLE PATRICE SELECTMAN
Appellant-Petitioner

v.

STATE OF TEXAS
Appellee-Respondent

Appealed from:

The 144th Judicial District Court, Bexar County, Texas &

Fourth Court of Appeals, San Antonio, Texas;

Cause No(s).: [2015CR9689] & [04-18-00553-CR], respectively

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

DEAN A. DIACHIN
Bexar County Asst. Public Defender
Paul Elizondo Tower
101 W. Nueva, Suite 370
San Antonio, Texas 78205
Ph: 210-335-0703
Fax: 210-335-0707

LEAD COUNSEL FOR APPELLANT.

ORAL ARGUMENT:
[REQUESTED].

IDENTITY OF PARTIES, COUNSEL, & TRIAL COURT

Pursuant to TEX. R. APP. P. 38.1(a) (West 2019):

The parties to this action are:

(1). Appellant: NICOLE PATRICE SELECTMAN, T.D.C.J.#: 02205755; Hobby Unit; 742 FM 712; Marlin, TX 76661-4685.

(2). Appellee: STATE OF TEXAS.

The trial attorneys are:

(1). For appellant: MARK J. McKAY, TBN: 13688520, 405 N. St. Mary's Street, Suite 1030; San Antonio, TX 78211; & LYNETTE M. BOGGS-PEREZ, TBN: 24084486, 310 S. St. Mary's Street, Suite 1910; San Antonio, TX 78205

(2). For the State: JOE A. MIMS, TBN: 24073633; & STEPHANIE FRANCO, TBN: 24093449; Bexar County District Attorney's Office, 101 W. Nueva St.; San Antonio, TX 78205.

The appellate attorneys are:

(1). For appellant: DEAN A. DIACHIN, TBN: 00796464, Bexar County Assistant Public Defender, 101 W. Nueva St., Suite 370; San Antonio, TX 78205.

(2). For the State: LAURA E. DURBIN, TBN: 24068556, Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710; San Antonio, TX 78205.

The trial court is:

(1). The HON. RAYMOND CRIS ANGELINI, sitting by designation, 144th District Court, Cadena Reeves Justice Center, 300 Dolorosa St., 2nd floor, San Antonio, TX 78205.

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STATEMENT ON RECORD CITATIONS

The reporter's record will be cited as "RR" and the clerk's record will be cited as "CR." For example: (4 RR 135-137) is meant to reference "Reporter's Record, Volume 4, pages 135 through 137." The reporter's record consists of six [6] volumes filed by a single court reporter (Maria E. Fattahi), and will be cited chronologically as follows:

(1 RR ___)	=	M. Fattahi, Vol. 1:	[Master Index];
(2 RR ___)	=	M. Fattahi, Vol. 2:	[Pretrial Motions & Voir Dire];
(3 RR ___)	=	M. Fattahi, Vol. 3:	[Trial Evidence];
(4 RR ___)	=	M. Fattahi, Vol. 4:	[Trial Evidence];
(5 RR ___)	=	M. Fattahi, Vol. 5:	[Charge, Closings, Verdict, & Punishment Evidence];
(6 RR ___)	=	M. Fattahi, Vol. 6:	[Punishment Charge, Verdict, & Sentencing];
(7 RR ___)	=	M. Fattahi, Vol. 7:	[Exhibits].

The clerk's record consists of a single volume filed by Bexar County District Clerk, Mary Angie Garcia, and will be cited as follows:

(1 CR ___)	=	M. Garcia, Vol. 1:	[Clerk's Record].

Trial exhibits will be cited: (7 RR ___ [SX-___]) & (7 RR ___ [DX-___]), respectively.

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Ms. Nicole Patrice Selectman, appellant, files this petition by and through her appellate counsel of record, Mr. Dean A. Diachin, Bexar County Assistant Public Defender, and in support thereof would show this Honorable Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests that oral argument be granted. The questions presented here are important to Texas jurisprudence because the court of appeals: (1) has decided a question of state law in a manner that conflicts with applicable decisions of this Court; and (2) has misconstrued Texas' statutes governing self-defense and defense of a third person.[1] Oral argument will provide a useful opportunity for this Court to ask — and for the parties to answer — any questions that remain about how these statutes should be applied prospectively.

STATEMENT OF THE CASE

Appellant was indicted on September 28, 2015 with a single count of causing serious bodily injury to a household, dating, or family member, alleged to have

1. *See* TEX. R. APP. P. 66.3(c),(d) (West 2019) (detailing non-exhaustive list of circumstances that will be considered by this Court in deciding whether to grant discretionary review).

occurred on or about April 2, 2015.[2] (1 CR 6). Two [2] different jury trials then ensued; the first hung with a single vote for guilt, and the second reached a guilty verdict on June 14, 2018. *See* Appendix A, p. 3 (containing affidavit by trial counsel).

Following the punishment verdict on June 15, 2018, the trial court assessed sentence at ten [10] years' imprisonment and a zero dollar [$0.00] fine. (1 CR 5, 125); (6 RR 19). Appellant timely filed notice of appeal on August 6, 2018. (1 CR 40). The Bexar County Public Defender's Office was appointed to serve as appellate counsel that same date. (1 CR 139). All briefs were timely filed by June 23, 2019.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals filed a memorandum opinion affirming appellant's conviction and sentence on March 25, 2020. *See* Appendix B (containing court of appeals' memorandum opinion).[3] A timely motion for *en banc* reconsideration was denied on May 22, 2020 and this amended PDR was filed on July 28, 2020.

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2 The State thus charged one count of aggravated assault, a first degree felony punishable by "imprisonment in [T.D.C.J.] for life or any term of not more than 99 years or less than 5 years" and "a fine not to exceed $10,000." TEX. PENAL CODE §§ 12.32(a),(b); 22.02(b)(1) (West 2015).

3. Delivering a memorandum opinion was improper in this case because this appeal involves: (1) issues important to the jurisprudence of Texas; and (2) application of existing rules to a novel fact situation likely to recur in future cases. *See* TEX. R. APP. P. 47.4(a),(b) (describing circumstances in which memorandum opinions are inappropriate). The crucial rules of law relevant here were announced in: *Krajcovic v. State*, 393 S.W.3d 282 (Tex. Crim. App. 2013); *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017); and, more recently, *Ebikam v. State*, PD-1199-18, 2020 WL 3067581 (Tex. Crim. App. June 10, 2020).

QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

Did the court of appeals err in concluding appellant was properly refused instructions on self-defense and defense another because no evidence showed appellant reasonably believed that a violent home intruder might cause imminent serious bodily injury or death to either appellant or Erica Rollins on April 2, 2015? (4 RR 221-227).

QUESTION NO. 2

Did the court of appeals err in concluding appellant was properly refused instructions on self-defense and defense of another because no evidence showed that appellant "shot the gun and admitted to her otherwise illegal conduct," all in apparent contravention of this Court's "confession and avoidance" doctrine? (4 RR 221-227).

QUESTION NO. 3

Did the court of appeals use the harmless error rule to substitute its own opinion about the strength of appellant's request for instructions on self defense and defense of another for actual findings of fact by a properly instructed jury? (4 RR 221-227).

GROUNDS FOR REVIEW

Ground for Review No. 1

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to permit a rational finding that appellant reasonably believed that deadly force was immediately necessary to defend herself or Erica Rollins against a violent home intruder on April 2, 2015. (4 RR 221-227).

Ground for Review No. 2

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the "confession and avoidance" doctrine because: (1) appellant never "flatly denied" any essential element of the offense charged; and (2) the record contains more than ample evidence from which the jury could find that appellant either did fire, or otherwise cause, the shot that injured the complainant here. (4 RR 221-227).

Ground for Review No. 3

The intermediate appellate court effectively substituted its own harm analysis for findings of fact by a properly instructed jury. (4 RR 221-227).

ARGUMENT

Ground for Review No. 1

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to permit a rational finding that appellant reasonably believed that deadly force was immediately necessary to defend herself or Erica Rollins against a violent home intruder on April 2, 2015. (4 RR 221-227).

A. Preservation.

During the guilt-innocence charge conference, appellant requested instructions on self-defense and defense of a third person, but was refused. *See* (4 RR 224) (stating, "That's denied, both of them"). These adverse rulings have thus preserved each of the grounds presented here for review. TEX. R. APP. P. 33.1(a)(1),(2); 66.1 (West 2019).

B. Guiding Legal Principles.

An instruction on a defensive issue must be given if the record contains "some evidence" to support the instruction, regardless of whether the evidence is weak, contradicted, or disbelieved by the trial court. *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016). Refusing defensive instructions is thus error if the record contains some evidence, from any source, that, when viewed from the standpoint of the actor, will support those instructions. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017).

And, absent provocation or concurrent criminal activity, the statutory elements for self-defense and defense of others are nearly identical, namely: (1) a defendant must reasonably believe that force is immediately necessary to quell an unlawful physical threat; (2) the force used must be directed against the person causing that threat; and (3) the force used must be no greater than necessary to repel the threat perceived. *See, e.g.*, TEX. PENAL CODE § 9.31(a) (West 2015) (stating, "[a] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force"); *Id.* at § 9.33 (West 2015) (permitting same degree of force to protect another as might be used to defend oneself under the same circumstances); *Id.* at § 1.07(a)(42) (West 2015) (defining "reasonable belief" as one "that would be held by an ordinary and prudent [person] under the same circumstances as the actor").

Likewise, a person is justified in defending against "apparent danger" to the same degree he would actual danger, even if the person perceived to be causing that danger has not used or attempted to use unlawful deadly force against the person. *See, e.g.*, *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. February 5, 2020) (stating, "[t]he evidence does not have to show the victim was actually using or attempting to use unlawful deadly force because a person has the right to defend

himself against apparent danger as he reasonably apprehends it"); *Dugar v. State*, 464 S.W.3d 811, 818 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (stating, "[t]he only requirement is that the person be justified in acting against the danger as he reasonably apprehends it. The reasonableness of the person's belief is viewed from the person's standpoint at the time he acted").

Finally, if there is any evidence that an intruder has unlawfully and with force entered an actor's occupied habitation, then "[t]he actor's belief that force was immediately necessary [to quell that threat] … is presumed to be reasonable." TEX. PENAL CODE § 9.31(a) (West 2015).

C. Standard of Review.

Whether a defensive issue is supported by evidence is a sufficiency question that is reviewed *de novo* as a question of law. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). In performing this analysis, an appellate court must view the evidence in the light most favorable to the instructions requested. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006).

D. Application of Law to Facts.

1. The Reasoning Advanced by the Court of Appeals.

Here, the court of appeals stated and concluded:

> The only evidence Selectman presented on the need to use deadly force was that [Rollins] and her boyfriend, who Selectman thought was

> an intruder, were arguing … [and] got into in a scuffle and were tussling around. This evidence is insufficient to permit a jury to rationally infer [that] … Selectman reasonably believed immediate use of deadly force … was necessary [to defend herself or Rollins].

Selectman v. State, 04-18-00553-CR, 2020 WL 1442645, at *3 (Tex. App.—San Antonio March 25, 2020, pet. filed) (mem op., not designated for publication).

2. The Evidence Supporting the Instructions Requested.

One version by the complainant, Rollins, is that appellant shot her. Other evidence showed Rollins was injured only after appellant attacked an intruder who was assaulting Rollins. *See Selectman*, 2020 WL 1442645, at *3 (claiming, "Selectman sought to prove her theory of the case through the testimony of Tracy Thomas"). But, Thomas was not the only source of relevant evidence here. Rollins, herself, helped by admitting that she initially told emergency medical personnel that "an intruder came in my house and I got shot," [3 RR 59], and then "Nicole saved me."[4]

4. Rollins' exact testimony is as follows:

> Q: … [Y]ou did say that when you went to Northeast [Methodist] that an intruder had come into the house?
>
> A: Yes.
>
> …
>
> Q: And that there was this scuffle that ensued and that … [in] your exact words "Nicole saved me."
>
> A. Yes.

(3 RR 125).

Likewise, Dr. Nicole Milouf helped by confirming that, at the emergency room, Rollins admitted that a home intruder was responsible for causing the danger that directly led to Rollins being shot. *See* (4 RR 104) (noting Rollins told Malouf that "an intruder had broken into her house … and that's when she got shot"). Accordingly, both Rollins and Dr. Milouf contributed to appellant's defenses by confirming that Rollins gave some evidence that she was injured only after an intruder had unlawfully entered the home where Rollins and appellant lived.[5] *See, e.g.*, *Gamino*, 537 S.W.3d at 510 (stating, "a self defense instruction [may be raised by] … any source that will support the elements of self defense"); *Shaw*, 243 S.W.3d at 657-58 (stating, "a defense is supported (or raised) … if there is some evidence, from any source, on each element of the defense").

Now, Tracy Thomas also helped by adding that Rollins told Thomas that "Nicole was in trouble for something she didn't do," [4 RR 129], and that Rollins was

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5. The court of appeals also notes:

> Erica's medical records contain different versions of who shot her. One version is that "she was shot by a stranger in her house after leaving door unlocked." Another version is that Erica was shot "by a familiar acquaintance" and "then held at gunpoint for another 30 minutes." And another version is that Erica "was shot ... by her ex-boyfriend."

Selectman, 2020 WL 1442645, at *3.

But, none of these various versions of events forecloses a finding that Rollins was shot only after — and thus because — appellant sought to defend Rollins or herself against a violent home intruder.

injured only after appellant attacked the intruder — who had already used force and threatened to use deadly force — against both appellant and Rollins in their own home. *See, e.g.,* (4 RR 150) (stating, "Nicole went upstairs and immediately started tussling with him because *he* was tussling with *Erica*") (emphasis added); (4 RR 130) (stating, "[Rollins] didn't really state … [who had the] gun … [just that] Nicole came upstairs and started scuffling with the [unknown man], and in the midst of that the gun went off"); (4 RR 130) (describing that, in addition to using unlawful physical force, the intruder also "threatened that, if [Rollins] didn't testify against [appellant] he would kill [either Rollins or appellant]").

Nothing in the record suggests that appellant understood the intruder's threat to mean that appellant and/or Rollins would be killed only *after* Rollins testified against the intruder. To the contrary, the assailant's threats could just as reasonably mean that, if Rollins had not agreed to implicate appellant, the intruder would have killed both women where they stood on April 2, 2015.

Finally, a fourth witness, Regina Spears, provided evidence that the intruder could have been Rollins' boyfriend and/or pimp, "Mac." *See* (4 RR 204-205) (showing appellant first learned about "Mac" in September or October 2015 when Spears spotted the complainant's image in a collage of pictures hanging on a wall in appellant's apartment); *see also, e.g.,* (4 RR 203-204) (describing how

Spears first met Mac and Rollins after answering a Craigslist job ad in August 2015, and quickly realized that, "I [felt] a strong possibility that this job was not legitimate"); (4 RR 205) (stating, "[they began] discussing the possibility of sexual intercourse … after the massage if the client wanted to … [and Rollins] talked about the pay and said that [Mac] would be getting a part of it for protection and … she would get a part of it for introducing me to the client"); (4 RR 215) (stating, "[Rollins indicated Mac] … would be … the protector if I were to be hired, but he didn't do much of the talking").

3. The Reasoning of the Court of Appeals is Flawed.

From Spears' testimony, a jury could find that, when she acted here, appellant only saw an unknown male intruder assaulting her girlfriend. Moreover, the court of appeals ignored the penal code section that provides, if evidence shows an intruder has forcibly entered an actor's occupied habitation, then "[t]he actor's belief that force was immediately necessary [to quell that threat] … is presumed to be reasonable." TEX. PENAL CODE § 9.31(a) (West 2015). Also, when, as here, additional evidence shows an unknown man is found assaulting a person inside an occupied home, it would be peculiar indeed to find, as the court of appeals did here, that an ordinary and prudent person may not, as a matter of law, reasonably believe the intruder poses an imminent danger of serious bodily injury or death.

Which is to say, if a reasonably perceived home invasion, alone, will justify use of some force against an intruder, then a reasonably perceived home invasion *plus* physical violence against someone inside should justify using deadly force against the assailing intruder. Indeed, none of us — in our own homes — should have to wait to see if a loved one is actually killed by a violent intruder before we may use deadly force to quell the imminent threat of serious bodily injury or death that would reasonably be perceived under those circumstances.

In concluding otherwise, the court of appeals failed to view the record from "appellant's standpoint at the time she acted" or in the "light most favorable to the instructions requested." The opinion below thus conflicts with applicable decisions of this Court, which hold:

> In resolving the issue before us, we must first keep in mind that we do not apply the usual rule of appellate deference to trial court rulings when reviewing a trial court's decision to deny a requested defensive instruction. … Quite the reverse, we view the evidence in the light most favorable to the defendant's requested submission.

Bufkin, 207 S.W.3d at 782 (Keller, P.J., opining); *accord Gamino*, 537 S.W.3d at 510 (stating, "[a] court errs in denying a self defense instruction if there is some evidence [that] … when viewed in the light most favorable to the defendant … will support the elements of self defense"); *see also Dugar*, 464 S.W.3d at 818

(observing, "[t]he reasonableness of a person's belief that force is immediately necessary is viewed from the person's standpoint at the time he acted").

Instead, the court of appeals — no less than three [3] times — focuses on either "conflicting," "different," or "disputed" evidence as if it were a circumstance to be taken against appellant. *See Selectman*, 2020 WL 1442645, at *3-4 (stating: [1] "[t]he evidence at trial was conflicting as to who shot Erica and under what circumstances;" [2] "Erica's medical records contain different versions of who shot her;" and [3] "[t]he evidence about … whether [Rollins] knew 'Mac' was disputed").

But, it was for the jury to resolve whether Rollins provided her initial "intruder story" on April 2, 2015 because she was afraid of appellant, or later abandoned that theory because she was afraid of her violent pimp. It certainly wasn't the lower courts' place to pick and choose which of Rollins' various versions of events to accept or reject. *See, e.g.*, *Gamino*, 537 S.W.3d at 512-513 (stating, "it was the jury's call as to whom to believe and what to believe. It was not the trial court's prerogative to preempt the issue because it thought Appellant's version was weak, contradicted, or not credible"); *Elizondo*, 487 S.W.3d at 196 (noting defensive evidence may be sufficient even if it's weak, contradicted, or disbelieved by the court).

To support its opinion that appellant didn't reasonably believe deadly force was immediately necessary, the lower court cites *Hunter v. State*, No. 05-18-00458-CR, 2019 WL 2521721, at *6 (Tex. App.—Dallas June 19, 2019, pet. ref'd). But, in that case Lonzell Hunter shot and killed a mother of two [2] — in a parking lot — simply because she refused to let go of a cell phone that Hunter and others were trying to steal. *See Hunter*, 2019 WL 2521721, at *6 (stating, "[even viewing] the evidence in the light most favorable to the requested submission, we conclude an ordinary and prudent person in appellant's circumstances could not have reasonably believed deadly force was immediately necessary to protect himself against another's use or attempted use of deadly force"). Here, the record includes evidence that appellant defended herself against a violent stranger in her own home, where use of such force is presumptively reasonable. *Hunter* is thus inapposite.

3. Conclusion on Ground for Review No. 1.

Because the court of appeals misconstrued: (1) the "apparent danger" and "reasonable belief" elements of penal code §§ 9.31; 9.32; & 9.33; and (2) failed to view the instant record from either appellant's standpoint on April 2, 2015, or in the light most favorable to the instructions requested, appellant's first ground should be granted discretionary review.

Ground for Review No. 2

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the "confession and avoidance" doctrine because: (1) appellant never "flatly denied" any essential element of the offense charged; and (2) the record contains more than ample evidence from which the jury could find that appellant either did fire, or otherwise cause, the shot that injured the complainant here. (4 RR 221-227).

A. Guiding Legal Principles.

The guiding legal principles set forth in appellant's first ground for review apply equally to this ground. Those same principles are thus incorporated by reference as if set forth verbatim.

B. Application of law to Fact.

1. The Reasoning Advanced by the Court of Appeals.

The court of appeals also stated and concluded:

> The only evidence Selectman presented on the need to use deadly force was that … [Rollins and a man] who Selectman thought was an intruder, were arguing … [and] got into in a scuffle and were tussling around. This evidence is insufficient to permit a jury to rationally infer … Selectman shot the gun and admitted to her otherwise illegal conduct[.]

Selectman, 2020 WL 1442645, at *3.

2. The Reasoning of the Court of Appeals is Flawed.

The lower court effectively ruled that this record failed to satisfy this Court's confession and avoidance doctrine. But, the lower court issued its opinion without the benefit of this Court's decision in *Ebikam v. State,* PD-1199-18,

2020 WL 3067581 (Tex. Crim. App. June 10, 2020), wherein this Court reaffirmed "Appellant did not have to admit the manner and means of the assault alleged against him in order to meet the requirements of our confession and avoidance doctrine."[6] *Ebikam*, 2020 WL 3067581, at *4. This Court reasoned that, although a defendant may not "foist upon the State a crime the State did not intend to prosecute," a defendant may nevertheless "claim a different version of events" than what is alleged in the charging instrument. *See* *Id.* at *4 (stating, "a defendant claiming self-defense who admits an assault by a different manner and means than that alleged in the charging instrument will [still] be entitled to a self-defense instruction as long as his admission pertains to the same event").

Further, in addition to the five [5] Judges in the *Ebikam* majority, those who joined the concurring and dissenting opinions (by Newell, J. and Yeary, J.) all seem to agree with the majority that "confession and avoidance" typically has less to do with the absence of an "adequate confession" as it does the presence of an "inconsistent denial". *See, e.g, Ebikam*, 2020 WL 3067581, at *3 (Keel, J., opining) (observing, "in order for a defendant to be entitled to an instruction on a justification defense, his evidence [simply] cannot *foreclose* commission of the conduct

6. Appellant asked the court of appeals to wait for this Court's decision in *Ebikam*, but it declined. *See, e.g.,* Appellant's Reply, p. 28 (requesting postponement of formal submission "until the parties, and this Court, may receive the benefit of the Texas Court of Criminal Appeals' opinion in *Ebikam v. State*, PD-1199-18").

in question") (emphasis added); *Ebikam*, 2020 WL 3073791, at *1 (Newell, J., concurring) (stating, "the terminology of 'confession and avoidance' has become a little misleading. Though we refer to the doctrine of 'confession and avoidance,' the Court correctly holds that our precedent does not require an actual 'confession' by a defendant to entitle him to a jury instruction on self-defense … So, if there is no real 'confession' requirement, then there certainly can't be, as the court of appeals held, a requirement that a defendant confess to a particular manner and means"); *Ebikam*, 2020 WL 3073792 at *1 (Yeary, J., dissenting) (emphasizing, "[a]bsolutely nothing in [our] statutory scheme requires the defense to concede the elements of the offense, in whole or in part, before the defendant may be entitled to a justification defense. Nor should his steadfast denial necessarily result in the refusal of a justification instruction — so long as there is other evidence in the record from which a jury could rationally conclude: 1) that the defendant did indeed commit the elements of the offense charged, notwithstanding his denial; but also, 2) that he was justified in doing so under Chapter 9 of the Penal Code").

Thus, contrary to the Fourth Court of Appeals opinion, there simply <u>*is*</u> no need that the evidence be sufficient "to permit a jury to rationally infer … that Selectman [either actually] *shot* the gun [or] *admitted* to her otherwise illegal conduct". *Selectman*, 2020 WL 1442645, at *3. Appellant merely had to: (1) prove the elements

of the defensive issues for she requested instructions; and (2) refrain from proffering anything that would negate an essential element of the offense charged. Here, nothing appellant offered below "foreclosed" instructions on self defense or defense of another.

And, as discussed in the first ground above, the testimonies of Rollins, Malouf, Thomas, & Spears, if believed, all constituted some evidence that, as a direct result of appellant attacking a home intruder, Rollins was shot through the arm. The precise manner and means of causing that injury are immaterial. *See Rodriguez v. State*, 538 S.W.3d 623, 629 (Tex. Crim. App. 2018) (holding that gravamen of simple assault and aggravated assault are exactly the same; the only difference is the *result* of serious bodily injury); *see also* TEX. PENAL CODE § 6.04(b)(2) (West 2015) (providing, "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different person or property was injured, harmed, or otherwise affected").

Alternatively, the record also includes evidence from which the jury could have concluded appellant did fire, or otherwise cause, the shot that injured Rollins. Patrolman Iris Mata, for example, testified she was present when her lieutenant

swabbed appellant's hands for gunshot residue on April 2 2015. (4 RR 7, 60-61).[7] And Bexar County Forensic Scientist Christina Vachon confirmed she analyzed the "GSR test kit" collected. *See* (4 CC 80-81) (noting kit was submitted under Converse Police Department "Number 1501088"). When asked what conclusions, if any, she drew from her analysis, Vachon replied that, from minute particles of antimony, barium, and lead detected on her hands, "Nicole Patrice Selectman … may have discharged a firearm, handled a discharged firearm, or was in close proximity to a discharging firearm [on April 2, 2015]." (4 RR 82, 93). The evidence that appellant fired the single shot in question could have come from any source. *Gamino*, 537 S.W.3d at 510; *Shaw*, 243 S.W.3d at 657-58.

Further, as noted, Rollins, Malouf, Thomas, & Spears also contributed some evidence that appellant reasonably believed that: (1) deadly force was immediately necessary to repel an unknown man using unlawful force inside her home; (2) the force used was directed against that man who appellant reasonably believed was posing a danger of imminent serious bodily injury or death; and (3) the force actually used — a single shot — was no greater than necessary to meet the threat reasonably perceived.

7. When asked why she was present at that time, Mata claimed, "I'm [just] curious by nature."

3. Conclusion on Ground for Review No. 2.

Given that: (1) the record contains sufficient evidence from which the jury could rationally find that appellant acted reasonably to defend herself or another; and (2) nothing offered below negated an element of the offense charged or "foreclosed" the instructions requested, appellant's second ground should be granted discretionary review.

Ground for Review No. 3

The intermediate appellate court effectively substituted its own harm analysis for findings of fact by a properly instructed jury. (4 RR 221-227).

A. Guiding Legal Principles For Harm.

This Court has held:

> When jury charge error is preserved at trial, the reviewing court must reverse if the error caused some harm. "Some harm" means actual harm and not merely a theoretical complaint. There is no burden of proof associated with the harm evaluation. Reversal is required if the error was calculated to injure the rights of the defendant. The harm evaluation entails a review of the whole record, including the jury charge, contested issues, weight of the probative evidence, arguments of counsel, and other relevant information. The harm evaluation is case-specific.
>
> Failure to instruct on a confession-and-avoidance defense is rarely harmless "because its omission leaves the jury without a vehicle by which to acquit a defendant who has [either] admitted to all the elements of the offense [or at least not flatly denied any of those elements]."
>
> Self-defense and necessity are confession-and-avoidance defenses.

Rogers v. State, 550 S.W.3d 190, 191-92 (Tex. Crim. App. 2018) (citations omitted).

B. Application of Law to Fact.

1. The Reasoning Advanced by the Court of Appeals.

The court of appeals found the instant error harmless because: (1) counsel touched on self-defense, defense of others, and the "castle doctrine" in his various remarks to the jury; (2) the jury heard all the testimony that supported the instructions requested here; and (3) the trial court defined all the various mental states the

State could rely upon for conviction. *See Selectman,* 2020 WL 1442645, at *4 (stating, "we cannot say any error in denying Selectman's request for defensive instructions was harmful"). In reaching this result, the court of appeals effectively held that, even if they'd been properly instructed, the jury would have rejected appellant's defenses. *See Selectman,* 2020 WL 1442645, at *4 (claiming, "[h]ad the jury believed the evidence [supporting the defenses raised below] … it would not have found that Selectman intentionally, knowingly, or recklessly caused Erica serious bodily injury").

2. The Reasoning of the Court of Appeals is Flawed.

In essence, the court of appeals held that no harm occurred simply because appellant was convicted. But, this logic could be used to ignore even the most well-supported of defensive issues. Indeed, under the harm standard applied below, a new trial is necessary only when the court of appeals believes an acquittal would have followed from proper jury instructions. But, this approach to harm usurps the fact finding function of the jury.

It also pays little heed to just how different the instant jury charge would have been if it had included proper instructions on self defense and defense of another. Such a charge would have: (1) explicitly invited the jury to consider whether appellant's conduct was *not* criminal, because it was justified; and (2) explicitly required an acquittal if the jury held so much as reasonable doubt about

the defenses raised below. *See, e.g.*, *Ebikam*, 2020 WL 3073792 (Yeary, J., dissenting) (noting, "[a] justification defense does not deny any element of the charged offense. Instead, it justifies what would otherwise constitute a prosecutable offense; it creates a defense to prosecution, a reasonable doubt about which will require the jury to acquit"); *Vanbrackle v. State*, 179 S.W.3d 708, 714 (Tex. App.—Austin 2005, no pet.) (stating, "the evidence clearly supports a finding that … appellant struggled with Weston to defend himself … [and this error is harmful] because the jury needed only to have a reasonable doubt as to whether appellant's actions were justified by self-defense to render an acquittal").

As support, the intermediate court cites *Braughton v. State*, 569 S.W.d 592, 613 (Tex. Crim. App. 2018). But, there the jury *did* receive proper instructions about when defensive force is presumptively reasonable. *See Braughton*, 569 S.W.d at 607 (acknowledging, "Appellant does not raise a complaint that the jury instructions [given below] on self-defense were erroneous … and the instructions reflect that they were correctly instructed"). Thus, in *Braughton*, the only issue was "whether the jury was irrational in rejecting appellant's defensive claims under these circumstances." *Id.* *Braughton* thus involved a completely different type of claim.

Instead, *Rogers* is much more squarely on point. *See Rogers*, 550 S.W.3d 192 (stating, "[f]ailure to instruct on a confession-and-avoidance defense is rarely harmless … [and harm happened here because] it is not inconceivable that a juror would have harbored a reasonable doubt about Appellant's guilt if given an opportunity to consider the defensive issues [raised below]").

Finally, the court of appeals has likewise ignored that this was the second jury to hear this case, and the first one hung with only a single vote in favor of guilt. Thus, if only this jury had been properly instructed, appellant may well have been acquitted.

3. Conclusion on Ground for Review No. 3.

Given additional clarification is needed on what harm standard applies in situations like this, appellant's third ground should be granted discretionary review.

PRAYER

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays the Honorable Court of Criminal Appeals of Texas grants appellant's petition for discretionary review, orders further briefing, and allows oral argument.

Respectfully submitted,

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.
Paul Elizondo Tower
101 W. Nueva St., Suite 370
San Antonio, Texas 78204
Phone: (210) 335-0701
Fax: (210) 335-0707
TBN: 00796464
E-mail: dean.diachin@bexar.org

ATTORNEY FOR APPELLANT.

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies this petition was generated by computer, and thus is limited to four-thousand-five-hundred (4,500) words. The "word count" function within Microsoft Word 10.0 indicates this brief consists, in relevant part, of no more than 4,463 words. The brief therefore complies with TEX. R. APP. 9.4(i)(2)(D) (West 2019).

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above and foregoing motion has been e-served upon: (1) Bexar County District Attorney's Office, Appellate Division, 101 W. Nueva St., San Antonio, TX 78205; and (2) State Prosecuting Attorney's Office, 209 W. 14th Street, Austin, TX 78701 on July 28, 2020.

/s/ *Dean A. Diachin*
DEAN A. DIACHIN
Bexar County Assistant Public Defender.

Appendix A.

Affidavit of Trial Counsel Detailing Procedural History from Appellant's First Trial

File Stamped: 07-21-20.

Trial Court No. 2015-CR-9689

IN THE

144TH DISTRICT COURT

BEXAR COUNTY, TEXAS

THE STATE OF TEXAS

V.

NICOLE SELECTMAN

On Appeal in Cause No. 2015-CR-9689

PD-0395-20; 04-18-00553-CR

in the 144TH Judicial District, Court of Bexar County, Texas.

LAW OFFICES OF MARK J. MCKAY
405 N. St. Mary's, Suite 1030
San Antonio, Texas 78205
(210) 227-3333 Telephone
(210) 271-9991 Facsimile
SBN: 13688520

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who, being by me duly sworn, on oath swears that the following facts are true:

"1. My full name is **MARK J. MCKAY**, I am more than 21 years of age and capable of making this affidavit. I am an attorney licensed in the State of Texas and have been practicing law for more than 27 years."

"2. I am the defense counsel for Nicole Selectman, defendant in **CAUSE NO. 2015-CR-9689,** styled "The State of Texas Vs. Nicole Selectman.

"3. I personally observed members of the original jury in the jury deliberation room handling the items of evidence after the trial and there were no sanitary gloves present. There is no way of telling if any of the evidence had touched other items of evidence and cross contaminated the items prior to the DNA testing. There is no way of telling if any of the bullet casing, bullet or fragments had been manipulated during the jurys' handling of the items.

"4. Defendant's counsel is stating under oath that he believes that any potential testing of items from the original trial that were handled or could have been handled by the jury should be prohibited from the re-trial of Ms. Selectman because it would be impossible to cure any chain of custody issues.

Mark J. McKay Attorney at Law

SIGNED AND SWORN to before me on July 21, 2020.

ANGEL SALAZAR
Notary Public, State of Texas
Comm. Expires 04-28-2021
Notary ID 12265782

Notary Public, State of Texas

EXHIBIT "A"

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who, being by me duly sworn, on oath swears that the following facts are true:

"1. My full name is **MARK J. MCKAY**, I am more than 21 years of age and capable of making this affidavit. I am an attorney licensed in the State of Texas and have been practicing law for more than 29 years. I qualified to represent death penalty cases in the State Of Texas"

"2. I am the lead defense counsel for Nicole Selectman, defendant in **CAUSE NO. 2015-CR-9689,** styled "The State of Texas Vs. Nicole Selectman.

"3. In the first trial of Nicole Selectman that was presided in front of Judge Priest, I want to state that the jury was deadlocked in their deliberations. The jury forewoman announced to the Court the deadlock at 11 jurors were voting for Not Guilty and one member was voting for guilty. This may be reflected in a jurors' note to the court. The judge instructed the jury to return and deliberate. The discussions were apparently heated and at one point a juror fell ill. They were removed by ambulance to the local hospital. Judge Priest asked the jury if perhaps that had changed decision of the jury. He did so in a most courteous manor. The jurors indicated that the person voting for not guilty was still present. The judge inquired to myself if I was willing to proceed with 11 jurors. Needless to say, the odds were substantially in my favor, so I agreed. At no time had the Court asked what the present vote was, the jury forewoman just offered the information. I also believe that at one point the jury foreperson sent a note to the judge indicating a "Not Guilty" I am not in possession of the note, but It may be in the court Record. Judge Priest requested the jury to continue deliberations. After many hours, the jurors announced they were deadlocked and it was not going to change." In the end, the jury vote was 10 jurors, "Not Guilty" and one juror "Guilty".

"4. In the first trial, Judge Priest allowed a full and complete voir dire. Why is this important? Because the facts of our case involved a African American woman who was involved in a same sex marriage. The case also included domestic violence. Bexar county is approximately 8.6% African American. The percentage of African American gay, or same sex marriage individuals in Bexar County is significantly lower. It was very important to voir dire on the potential jurors panel their feelings on all three issues. Judge Priest recognized that fact and allowed ample time for defense counsels' questions. In the retrial in front of Judge Anglini, Defense counsel asked for ample time to inquire of the jury panel on these three issues before voir dire began. If memory served me correctly, he allowed 30 minutes. This judge is well known for his extremely limited time for voir dire and that is why I asked for ample time before the panel was brought into the court. I believe he allowed an additional 10 or 15 minutes over his usual minimal time. There is absolutely no possibility that a full and proper juror inquiry can be

performed by defense counsel within the allotted time."

"5. If memory serves counsel correctly, I believe that Judge Priest, in the first trial, also allowed a self defense and possibly defense of a third party jury instruction, however< I do not have a copy of the first trial transcript. These were both denied in the retrial. Counsel believes that it was vital for the jury to allow for the ability to determine at minimum a self defense of Defendant. Because defense counsel showed at trial that another person possessed a gun during the confrontation and the alleged crime occurred within the Defendants' residence, the jury should have been able to consider the instruction of self defense. Because this instruction was not provided, Ms. Selectman was harmed."

"6. Defendant's counsel is stating under oath that he believes that the retrial results would have concluded in a Not Guilty or another hung jury, had defense counsel been allowed both additional time for voir dire as well as a jury instruction on self defense, especially since the State presented the same or similar evidence and witnesses."

"7. I draft this Affidavit in conjunction with an earlier affidavit indicating that the evidence that went to the jury room with the first trial was handled by the jurors. There can be no true chain of custody in the second trial."

Mark J. McKay Attorney at Law

SIGNED AND SWORN to before me on July 21, 2020.

Notary Public, State of Texas

ANGEL SALAZAR
Notary Public, State of Texas
Comm. Expires 04-28-2021
Notary ID 12265782

EXHIBIT "B"

Appendix B.

Court of Appeals
(Fourth Court of Appeals District)

Memorandum Opinion
(Not Designated for Publication)

Delivered & Filed:
03-25-20.

2020 WL 1442645

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

DO NOT PUBLISH
Court of Appeals of Texas, San Antonio.

Nicole Patrice SELECTMAN, Appellant
v.
The STATE of Texas, Appellee

No. 04-18-00553-CR
|
Delivered and Filed: March 25, 2020

From the 144th Judicial District Court, Bexar County, Texas, Trial Court No. 2015CR9689, Honorable Lorina I. Rummel, Judge Presiding

Attorneys and Law Firms

APPELLANT ATTORNEY, Dean Diachin, Bexar County Public Defender's Office, 101 W. Nueva, Suite 370, San Antonio, TX 78205.

APPELLEE ATTORNEY, Laura E. Durbin, Assistant Criminal District Attorney, 101 W. Nueva, Suite 370, San Antonio, TX 78205.

Sitting: Sandee Bryan Marion, Chief Justice, Rebeca C. Martinez, Justice, Luz Elena D. Chapa, Justice

MEMORANDUM OPINION

Opinion by: Luz Elena D. Chapa, Justice

***1** Nicole Selectman appeals her conviction for aggravated assault. She argues the trial court erred by admitting evidence over her chain-of-custody objection and in violation of her confrontation rights, and by denying her request to submit jury instructions on self-defense and defense of another. We affirm the judgment of conviction.

PROCEDURAL BACKGROUND

Selectman was indicted for the aggravated assault of her ex-girlfriend, Erica. Selectman pled not guilty and the case proceeded to a jury trial. The evidence at trial showed Erica and Selectman were living together in Erica's house in Converse, Texas, even though their relationship had ended. On April 2, 2015, Erica was shot in her left arm by someone in her home.

There is conflicting evidence as to who shot Erica. Erica testified Selectman shot her during an argument the two had about Erica evicting Selectman. Other evidence showed Erica reported an intruder had entered her house. And, there was testimony showing Erica and her fiancé, boyfriend, or ex-boyfriend "Mac" were at the house arguing about money, Mac and Selectman had a "scuffle," and a gun "went off" hitting Erica's arm.

During trial, the court admitted evidence, over Selectman's objection, showing Selectman had gunshot residue on her hands. The jury found Selectman guilty and assessed a punishment of ten years in prison. The trial court then imposed Selectman's punishment in open court. After the trial court signed the judgment of conviction, Selectman filed a timely notice of appeal.

ADMISSION OF GUN RESIDUE EVIDENCE

Selectman argues the trial court erred by admitting evidence regarding the gunshot residue test and the test's results over her chain-of-custody and confrontation objections. At trial, City of Converse officer Iris Mata testified she observed a lieutenant obtain a sample from Selectman's hands for gunshot residue testing. A Bexar County forensics scientist testified about the results of the test, concluding Selectman had gunshot residue on her hands.

A. Standard of Review

We review "a trial court's admission of evidence under an abuse of discretion standard." *Watson v. State*, 421 S.W.3d 186, 189 (Tex. App.—San Antonio 2013, pet. ref'd). "The trial court does not abuse its discretion by admitting evidence unless the court's determination lies outside the zone of reasonable disagreement." *Id.* at 190.

B. Chain of Custody

"A chain of custody is sufficiently authenticated when the State establishes the beginning and the end of the chain of custody, particularly when the chain ends at a laboratory." *Id.* (internal quotation marks omitted). "Links in the chain may be proven by circumstantial evidence." *Id.* Selectman argues the chain of custody was not established because the lieutenant who administered the test did not testify. However, the trial court admitted the gunshot residue test kit with the chain of custody noted on it, Mata testified she saw the lieutenant take the sample from Selectman's hands, and other evidence showed the kit included the sample the lieutenant had taken from Selectman's hands. Selectman does not challenge the sufficiency of other evidence establishing the chain of custody. We therefore cannot say the trial court's ruling to admit the gunshot residue evidence over Selectman's chain-of-custody objection was outside the zone of reasonable disagreement. *See id.* We overrule this issue.

C. Confrontation

***2** A defendant has a right to confront witnesses who make testimonial statements against her. *State v. Guzman*, 439 S.W.3d 482, 485 (Tex. App.—San Antonio 2014, no pet.). This right extends to lab technicians who analyze sample materials, such as a blood draw, and prepare reports based on that analysis, because those statements are testimonial. *Id.* at 485–88. The right does not extend "to a person who only [obtains sample materials] and has no other involvement in the analysis or testing of [the] sample." *Id.* at 488.

Selectman argues she had a right to confront the lieutenant who obtained the sample from her hands. But the lieutenant is a person who obtained sample materials and had no other involvement in the analysis or testing of the sample. *See id.* Selectman had the opportunity to cross-examine Mata, who observed how the lieutenant obtained the sample, and the Bexar County forensics scientist, who conducted the test and analysis and prepared the report. Because the record does not show the admission of the results of the gunshot residue test violated Selectman's confrontation rights, we overrule this issue.

SUBMISSION OF DEFENSIVE ISSUES

Selectman argues the trial court erred by denying her requested instructions on self-defense and defense of others. "Our first duty in analyzing a jury-charge issue is to decide whether error exists." *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). "Then, if we find error, we analyze that error for harm." *Id.*

A. Applicable Law

"The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense." TEX. PENAL CODE § 2.03(c). The trial court must give a requested instruction on every defensive issue raised by the evidence regardless of the source, strength, or credibility of that evidence. *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013). Even a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense. *Id.*

"Whether a defense is supported by the evidence is a sufficiency question reviewable on appeal as a question of law." *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). When reviewing a trial court's decision denying a request for a defensive issue instruction, we view the evidence in the light most favorable to the defendant's requested submission. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017).

A person is justified in using force against another when and to the degree that person reasonably believes the force is immediately necessary to protect herself against another person's use or attempted use of unlawful force. TEX. PENAL CODE § 9.31. Deadly force is justified if a person would be justified in using force under section 9.31 and she reasonably believes deadly force is immediately necessary to protect herself against another's use or attempted use of deadly force. *Id.* § 9.32.

A person is justified in using deadly force to protect a third person if: (1) she would have been justified in using deadly force to protect herself against the unlawful deadly force she "reasonably believes to be threatening the third person [s]he seeks to protect," and (2) she "reasonably believes ... intervention is immediately necessary to protect the third person." *Id.* § 9.33. "Reasonable belief" is defined as a belief that would be held by an "ordinary and prudent" person "in the same circumstances as the actor." *Id.* § 1.07(a)(42).

B. The Evidence

***3** The evidence at trial was conflicting as to who shot Erica and under what circumstances. Erica testified that on the morning of April 2, 2015, she and Selectman had an argument after Selectman came home from work. Erica had asked Selectman to move out of the house, and Selectman refused. Erica testified she went to the police station and sought help with evicting Selectman, and then came back home. Erica further testified Selectman started asking her whether she was "talking to" or "sleeping with" anyone else and, after Erica denied doing so, Selectman accused her of lying.

According to Erica, Selectman grabbed a gun and shot Erica. Erica went to the restroom and locked the door; Selectman banged on the door, which Erica eventually opened; and Erica allowed Selectman to look through her phone messages. Erica further testified Selectman pointed the gun to her head and threatened to kill her. Erica also stated that when Selectman refused to call for medical help, Erica agreed to tell the police an intruder came into the house and Selectman saved her. Selectman drove Erica to the hospital. Erica testified she initially told hospital staff that an intruder came into her home and she was shot, but then, after Selectman was no longer in the room, told a nurse Selectman had shot her.

Erica's medical records contain different versions of who shot her. One version is that "she was shot by a stranger in her house after leaving door unlocked." Another version is that Erica was shot "by a familiar acquaintance" and "then held at gunpoint for another 30 minutes." And another version is that Erica "was shot ... by her ex-boyfriend."

Selectman sought to prove her theory of the case through the testimony of Tracy Thomas, a friend of both Erica's and Selectman's. Thomas testified Erica had told her that Selectman "was in trouble for something that she didn't do," and she "had a boyfriend behind [Selectman's] back." Thomas further testified Erica said that on the day of the incident, Erica "and her boyfriend were arguing about money" at Erica's house. When Selectman came home, she "instantly came upstairs to [Erica's] defense because she didn't know what was going on and I guess there was a gun involved and the gun went off in the middle of the struggle." Thomas stated Erica did not say who had the gun, but said Erica's boyfriend threatened to kill Erica if she did not testify against Selectman. According to Thomas, Erica had said Selectman "came upstairs and started scuffling with the boyfriend and in the midst of that the gun went off." Thomas also stated, "I've been through a similar situation to be afraid of someone and it will drive you to lie, because I've done it. I've been shot by my ex-husband, lied about who shot me because I was afraid of him."

C. No Error

We hold the trial court did not err by denying Selectman's request for instructions on self-defense and defense of another. The only evidence Selectman presented on the need to use deadly force was that Erica and her boyfriend, who Selectman thought was an intruder, were arguing about money, and she and Erica's boyfriend got into in a scuffle and were tussling around. This evidence is insufficient to permit a jury to rationally infer: (1) Selectman shot the gun and "admit[ted] to [her] otherwise illegal conduct; and (2) Selectman reasonably believed immediate use of deadly force—shooting at Erica's boyfriend or an intruder, but missing and hitting Erica—was necessary for the defense of herself or of Erica. *Jordan v. State*, No. PD-0899-18, 2020 WL 579406, at *1 (Tex. Crim. App. Feb. 5, 2020); *accord Hunter v. State*, No. 05-18-00458-CR, 2019 WL 2521721, at *6 (Tex. App.—Dallas June 19, 2019, pet. ref'd) (mem. op.) (holding evidence of a "tussle" and "scuffle" did not justify the use of deadly force in defense).

D. No Harm

***4** Alternatively, we hold that any error in not submitting the defensive instructions was harmless. "When, as here, the defendant has preserved error by requesting the challenged instruction, we reverse the conviction if the denial of the instruction resulted in some harm to the defendant." *Braughton v. State*, 569 S.W.3d 592, 613 (Tex. Crim. App. 2018). " 'Some harm' means actual harm and not merely a theoretical complaint." *Id.* In considering harm, the degree of harm must be assessed in light of the record of the trial as a whole. *See id.*

During voir dire, defense counsel noted the existence of legal justifications for the use of deadly force, such as self-defense, defense of another, and the Castle Doctrine. In his opening statement, Selectman's counsel told the jury that the defense witnesses' testimony would show Erica was lying to protect her boyfriend, who had threatened her if she did not testify against Selectman. The opening statement was vague as to whether Selectman's theory of the case was that Selectman or Erica's boyfriend actually shot the gun.

The evidence about who shot Erica, under what circumstances, and whether she knew "Mac" was disputed. Thomas's testimony was vague, but the

defense's evidence and trial counsel suggested an intruder or Erica's boyfriend shot Erica. The trial court admitted photographs of the inside of Erica's house from the day of the incident, and the photographs showed blood in the restroom and on the carpet outside of the restroom. The photographs did not appear to support one side's theory of the case more than the other side's theory. Erica's neighbor testified he was outside smoking a cigar during the approximate timeframe of the incident. He stated he saw Selectman come and go from the house, but never saw Erica.

The jury charge instructed the jury on the mental states required for aggravated assault: intentionally, knowingly, and recklessly. During closing argument, Selectman argued that if she shot Erica, it was during a "scuffle" or "tussle" during which she was trying to defend Erica. Had the jury believed the evidence, this explanation would have negated the required mental states. In other words, had the jury believed Thomas's testimony, it would not have found that Selectman intentionally, knowingly, or recklessly caused Erica serious bodily injury. Considering the relevant parts of the record, we cannot say any error in denying Selectman's request for defensive instructions was harmful. *See* TEX. R. APP. P. 44.2(b).

CONCLUSION

We affirm the judgment of conviction.

All Citations

Not Reported in S.W. Rptr., 2020 WL 1442645

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Dean Diachin on behalf of Dean Diachin
Bar No. 796464
Dean.Diachin@Bexar.org
Envelope ID: 44898693
Status as of 07/29/2020 09:20:43 AM -05:00

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Shameka A.Roberts		shameka.roberts@bexar.org	7/28/2020 3:30:02 PM	SENT
Laura Durbin		laura.durbin@bexar.org	7/28/2020 3:30:02 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	7/28/2020 3:30:02 PM	SENT